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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

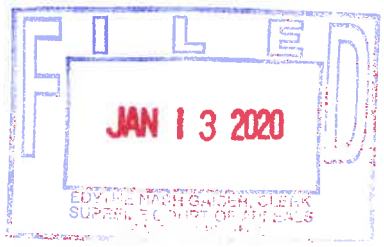
JAMES A. MOORE, JR.,

Claimant Below,
Petitioner,

v.

ARCH COAL, INC.,

Employer Below,
Respondent.



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PETITIONER'S BRIEF

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BRIEF OF APPELLANT JAMES MOORE, JR.

I. ASSIGNMENTS OF ERROR

1. The decisions of the Board of Review ("Board"), affirming the decisions of the Administrative Law Judge ("ALJ"), are based on an erroneous conclusion of law. Both the ALJ and the Board erred when they concluded that James Moore's cervical and radicular pain or radiculopathy were not compensable because Moore had preexisting disc disease, even though that preexisting disc disease was entirely asymptomatic until Moore suffered a serious workplace injury resulting in severe cervical radicular pain that Moore had *never* suffered before and that constituted a "discreet new injury" under the test articulated in Syl. Pt. 3, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016).

2. The decisions of the Board, affirming the decisions of the ALJ, are based on an erroneous conclusion of law. Both erred in concluding that Moore's cervical radicular pain or radiculopathy were not compensable despite undisputed evidence that Moore's workplace injury "aggravate[d] or accelerate[d]" his preexisting, but asymptomatic disc disease "to the extent of causing a disability sooner than would otherwise have occurred" entitling Moore to workers' compensation benefits under the syllabus points in *Charlton v. State Workmen's Compensation Comm'r*, 160 W. Va. 664, 667, 238 S.E.2d 241 (1977); *Manning v. State Compensation Commissioner*, 124 W. Va. 620, 22 S.E.2d 299 (1942); and *Hall v. State Compensation Comm'r*, 110 W. Va. 551, 551,159 S.E. 2d 299 (1931).

II. STATEMENT OF THE CASE

This case presents an opportunity to clarify the law regarding preexisting conditions in a workers' compensation case where a worker with evidence of degenerative disc[1] disease on MRI,

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[1] "Disc," as in disc disease, appears to be the preferred spelling. However, the spelling "disk" was sometimes used in documents in the case record, particularly in the transcript of Dr. Jin's deposition. Counsel has used "disc" except when the spelling "disk" was used in the original document.

but who had never had any symptoms of the disease and who, according to the undisputed evidence, might not have become symptomatic for disc disease for many years to come, is injured in a workplace accident resulting in pressure on a cervical nerve and substantial cervical and radicular pain that continued until he had a C5-6 cervical fusion. The Board's decision to deny compensation relied on erroneous conclusions of law with regard to the elements necessary for compensability where there is a preexisting injury or disease.

Although the Board ruled against Moore, the Board appears to have recognized the need to clarify the relevant law when it stated in its Order: ***"in the absence of further clarification*** regarding the *Gill* case, the Board finds the Administrative Law Judge's Decision is not clearly wrong." A-0045[2] (emphasis added). This case presents the Court with the opportunity to provide that clarification.

The appeal involves several issues that turn on the Board's (and ALJ's) erroneous conclusion of law concerning the tests for compensability where there is a preexisting, but asymptomatic, disc disease. Those issues include:

- Whether the Board relied on an erroneous conclusion of law in denying Moore's request for an order recognizing the compensability of his cervical radicular pain or radiculopathy.

- Whether, if this Court holds that Moore's cervical radicular pain or radiculopathy is compensable, his request to reopen his claim for additional Temporary Total Disability ("TTD") benefits for the time he was recovering from his cervical fusion should be granted and this matter should be remanded for a determination of the TTD benefits he is entitled to receive.

- Whether, if this Court holds that Moore's cervical radicular pain or radiculopathy is compensable, it should set aside the Board's decision that Moore is not entitled to a Permanent Partial Disability ("PPD") award and remand the claim for a determination of whether he is entitled to PPD benefits and, if so, the amount he should be awarded.

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[2] Claimant's Appendix is referred to as "A" throughout this brief.

Other issues were raised in claims decided by the Board, but Moore is only pursuing the issues noted above, all of which turn on whether Moore's cervical radicular pain states a compensable claim for injuries suffered in his November 2016 workplace accident.

A. Factual Record

As discussed *infra*, Moore is aware of this Court's limited scope of review. Although Moore presents a summary of the evidence, his appeal is predicated upon the reliance of the Board, in upholding the ALJ Decision, on an erroneous conclusion of law when it applied Dr. Chuanfang Jin's test for compensability, a test that is inconsistent with the decisions of this Court. The Argument will rely primarily on the testimony of Dr. Jin and on those facts of record that are undisputed.

B. The Injury of November 14, 2016

On November 14, 2016, Moore reported for work as a coal miner at the Leer Mining Complex of Arch Coal, Inc. ("Arch"). He had no history of cervical pain and no history of either cervical radicular pain or radiculopathy.[3] At the time, Moore was 48 years old, had approximately ten (10) years of coal mining experience, and had no reason to believe that his career as a coal miner would not continue for many years to come. *See, e.g.*, A-0225, ¶ 3; A-0091. However, during his shift, Moore suffered a career ending injury. While operating a shuttle car, he "headed down the slope, the shuttle car went over a dip in the bottom[,]" the brakes suddenly locked up and Moore was thrust upward, jamming his head with some force into the shuttle car's canopy. A-0225, ¶ 7. "It was like being in a crash or hitting a brick wall." *Id.* Dr. Jin – the doctor to whom Arch's workers' compensation carrier referred Moore [A-0225, ¶ 14] and whom the ALJ and the Board, in adopting

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[3] Dr. Jin diagnosed radicular pain while Drs. France, Vaglienti, and Guberman diagnosed radiculopathy. Either diagnosis supports a conclusion of compensability. At a minimum the physicians whose opinions are of record agreed that Moore developed cervical radicular pain after his accident. Moore will rely primarily on Dr. Jin's diagnosis of cervical radicular pain, a diagnosis that appears throughout her records and, as demonstrated *infra*, should be compensable under West Virginia law.

the ALJ's findings, relied upon to deny Moore's protest and appeal– admitted that the force of Moore's head against the canopy probably caused the compression of Moore's spine.[4] A-00073, 16:2-11. ***Dr. Jin also agreed that Moore"[b]umped his head forcefully enough to initiate cervical pain and radiculopathy that he did not have -- was not symptomatic before that day[.]"***[5] A-0075, 21:9-13 (emphasis added).[6]

Moore reported the injury to his section foreman within twenty (20) minutes of the accident and filled out an accident report after the shift ended. A-0226, ¶ 10.

C. History of Treatment for November 14, 2016 Injuries

Moore had no history of cervical radicular pain or radiculopathy prior to his November 2016 injury. *See, e.g.*, A-0072, 9:6-10:12.[7] Yet, following the accident, Moore suffered from cervical radicular pain that required a cervical fusion in June 2018. *See, e.g.*, A-0272 (cervical radicular pain); A-0248-0249 (fusion). Although an MRI taken in December 2016 *after* the accident disclosed that Moore had preexisting cervical disc disease, ***Dr. Jin agreed that the disc disease discovered in the MRI was not unusual for a coal miner of Moore's age.*** A-0074, 17:17-18:2; 36:13-17.

During the first few days after the accident, Moore continued working in the mine, believing that his neck and arm pain were muscle strains that would heal without medical intervention. A-0226, ¶ 11. However, the pain continued and, on November 17, 2016, three (3) days after jamming

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[4] The Board incorporated the ALJ's findings of fact and conclusions of law without a discussion of the facts or the law except for its reference to the "absence of further clarification regarding the Gill case."

[5] Moore also injured his arm and shoulder in the accident. He was holding onto a handhold inside the shuttle car with his right hand at the time the brakes locked up. A-0226, ¶ 9. The force of the sudden stop of the shuttle car was so great that his upper extremity and shoulder were damaged, requiring surgical repair. *Id.* The injury was found compensable and is not an issue in this appeal.

[6] The employer has not questioned Moore's credibility regarding his description of the accident.

[7] This is undisputed. Arch has never contended that Moore had any history of cervical or radicular pain, or of radiculopathy, prior to his injury of November 14, 2016. *See, e.g.*, A-0072, 10:9-12.

his head into the canopy, Moore went to MedExpress. A-0089. Moore reported "having 'pain in upper arm up to shoulder,' also having 'neck pain that goes down between both shoulder blades.'" *Id.*

Moore's neck pain persisted and he returned to MedExpress on November 28, 2016, December 5, 2016, and January 16, 2017. *See, e.g.*, A-0095 ("injury to R shoulder and neck pt stated it is not any better"); A-0098 ("patient feels the same"); A-0100 ("shoulder and neck pain is not getting better"). MedExpress reported the results of Moore's MRI: "MRI reveals bulging cervical discs with at least one with equivocal nerve impingement." *Id.*

On December 9, 2016, Moore started physical therapy at Pro PT. His "symptoms include[d] pain in the cervical area with pain going down into the R periscapular area." and "intermittent numbness and tingling into the R hand into all 5 fingers." A-0105. Pro PT records note, "Evaluation findings reveal s/s indicative of cervical intervertebral disk disorder with R UE radiculopathy. . . management of radicular symptoms, and soft tissue dysfunction." A-0108. The diagnosis code was "M54.12: Radiculopathy, cervical region."[8] A-0105.

Moore next saw Dr. Jin who, on January 5, 2017, noted that Moore "is still complaining of neck pain that starts on the center and right, and radiates to the r shoulder." A-0111. Dr. Jin added: "The pt has tingling and numbness in the fingers of the right hand (except of the first finger)." She diagnosed cervical sprain and *cervical radicular pain. Id.* Dr. Jin concluded that Moore's accident had "exacerbated" his cervical degenerative disc disease. *Id.*; *see e.g.*, A-0113 ("The pt has hx of degenerative disk disease and the injury exacerbated the symptoms."); A-0075, 24:21-25:3 ("the incident did play a role [in causing Moore's pain]"). The assessment states "Cervical radicular

[8] https://www.icd10data.com/ICD10CM/Codes/M00-M99/M50-M54/M54-/M54.12.

pain," but Dr. Jin's diagnosis code for cervical radicular pain in her physical therapy referral was the same as the physical therapist and Dr. Vaglienti: M54.12 "radiculopathy, cervical region." A-0113.

On January 9, 2017, the diagnosis of "neck pain" was added to the original diagnosis of right shoulder strain/sprain and upper back strain at the request of MedExpress.

On January 16, 2017, Moore returned to MedExpress for continuing neck problems: his range of motion was "abnormal during extension in neck" and "during rotation in neck", "Midline spinous tenderness noted in neck, Paraspinous tenderness noted in neck." A-0101. The assessment included: "Cervical disc disorder." *Id.*

Because of Moore's neck and shoulder problems, MedExpress restricted Moore's activities at work. A-0225, ¶ 12. Moore explained what happened next:

> After MedExpress restricted my work, I was off work for several weeks due to my work restrictions and other illness. Leer, however, then called me back to work as a fire boss at Leer. The fire boss work was difficult and painful for me to complete.

Id., ¶ 13.

Moore saw Dr. Jin on February 8, 2017. A-0131-0132. Dr. Jin's diagnosis again included "cervical sprain," "cervical radicular pain" and "neck pain." *Id.* The office notes confirm that Moore "[h]as constant neck pain" that "radiates to the right shoulder and arm." *Id.*

Moore returned to Dr. Jin on March 6, 2017. Dr. Jin noted, "Neck exam shows decreased range of motion in the cervical spine." A-0135. She listed cervical radicular pain as a diagnosis. Moore's "neck pain seems getting worse, more intense. He has constant neck pain and it radiates to the right shoulder and arm. He has some tingling In [*sic*] the right finger, mainly right index finger. It come and goes." *Id.* Dr. Jin's diagnosis included "cervical radicular pain." *Id.* She added that

"[h]e has significant radicular symptoms that bothers [*sic*] *his function." Id.* (Emphasis added.) Because of his radicular symptoms, Dr. Jin referred Moore to the WVU Center for Integrative Pain Management ("Pain Center"). The Order from Dr. Jin for "Consult/Referral Pain Clinic" notes Dr. Jin's diagnosis as "Cervical radicular pain [M54.12]," *i.e.*, Dr. Jin again used the diagnosis code for radiculopathy, cervical region: M54.12. A-0138.

Moore presented at the Pain Center on April 3, 2017 with "neck pain," that was a "chronic problem," associated with hitting "his head on coal car roof." A-0136. The "Assessment" included "cervical radicular pain" and the diagnosis code M54.12, the code as in Dr. Jin's records. A-0137.

Moore next saw Dr. Jin on April 10, 2017. A-0139. The "History" notes include "constant neck pain" that "radiates to the right shoulder and arm" and "numbness and tinging [*sic*] to the right arm that comes and goes." *Id.* The "Ortho Exam" includes "[t]he range of motion is reduced. Spurling test is abnormal in the right (contralaterally). Neurological exam is non-focal." *Id.* Dr. Jin reiterated her diagnoses including "cervical radicular pain." A-0303.

Moore returned to the Pain Center on May 2, 2017 for cervical epidural steroid injections.

On May 8, 2017, Moore returned to Dr. Jin's clinic. Dr. Jin noted:

> His neck pain stays the same, not better and no worse. He has radiating pain to the right upper arm. He has numbness in the right arm that has not changed.

A-0271. She also wrote that "[h]e reports palpable tenderness in the lower cervical spine, mainly in the right side. Spurling test is abnormal in the right (contralaterally)." Her diagnoses still included cervical radicular pain. A-0272.

Moore saw Dr. Jin again on September 12, 2017. The "Ortho Exam" again notes an abnormal Spurling test on the right. A-0272. Dr. Jin's diagnosis included "cervical radicular pain." *Id.* Dr. Jin noted that Moore was "unable to work underground coal mine." *Id.*

On October 10, 2017, Moore saw Dr. Jin and reported "numbness in the right arm that has not changed" and "constant neck pain" that " radiates to the right arm frequently." Dr. Jin continued to diagnose cervical radicular pain. A-0277.

Moore was evaluated at the Pain Center on January 5, 2018. The notes indicate that Moore "has tried and failed conservative treatment of physical therapy finished in January for about 3 months with little relief, traction, TENS, NSAIDs, acetaminophen, gabapentin and muscle relaxers." A-0191.

Dr. Vaglienti saw Moore on January 17, 2018, at the Pain Center for a trigger point injection with ultrasound. The pre-procedure diagnoses included right shoulder pain, neck pain and myosfascial muscle pain. A-0198. The Pain Center recommended additional treatment, but Arch's workers' compensation carrier refused to authorize further treatment.[9] A-0227-0228, ¶¶ 23, 25-26. Moore had to arrange treatment with payment from health insurance or personal funds. A-0227, ¶ 24.

Moore was treated at the Pain Center on February 15 and March 9, 2018. The diagnoses included radiculopathy, diagnosis code M54.12 and M47.22 on February 15 and M54.12 on March 9, 2018. A-0285; A-0213.

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[9] *See* Note of Pain Center visit on January 5, 2018, that states: "[t]he neck pain is worse. TPI's [Trigger Point Injections] were ordered at his last visit-they were denied by insurance." A-0190.

Moore saw Dr. France, an orthopedic spine surgeon on May 8, 2018. He assessed Mr. Moore as having "a right C6 radiculopathy." A-0234. He noted that if the symptoms did not improve with a carpel tunnel release, they would like to proceed with a "cervical diskectomy and fusion." A-0234.

Moore returned to Dr. France on June 27, 2018, to prepare for a C5-6 anterior cervical fusion scheduled for June 29, 2018, with incapacitating symptoms associated with clinical *and imaging evidence of C6 radiculopathy*. A-0240. On August 9, 2018, Moore saw Dr. France for a follow up of the cervical fusion that occurred on June 29, 2918. A-0248.

D. Radiological Evidence

MRIs of Moore's cervical spine were performed in 2016 and 2018. A-0103; A-0221. Moore also had x-rays performed at the request of Dr. France. A-0232. The radiological evidence did not conclusively identify a nerve impingement, but the finding on the MRI in 2016 included "C5-6 diffuse posterior disc bulge without *definite* nerve root impingement." A-0103 (emphasis added).

E. Medical opinions

1. Dr. Chuanfang Jin.

Dr. Jin, a physician at the WVU Institute of Occupational and Environmental Health, became Moore's doctor following Moore's visits to MedExpress. Moore did not choose Dr. Jin. He had never seen her prior to his injuries of November 14, 2016. A-0226, ¶ 14. Arch's case manager on Moore's claim arranged for his treatment WVU and, apparently, for Dr. Jin to be his doctor.[10] *Id.*

[10] Dr. Jin acknowledged that she never gets IME referrals from attorneys representing claimants in workers' compensation cases, but she does get referrals from insurance carriers. A-0087, 69:3-70:3.

Dr. Jin disagreed with the other physicians on two main issues. First, at her deposition, she initially said that Moore had radiculopathy.[11] However, she subsequently distinguished radicular pain caused by a nerve irritation from radiculopathy caused by a nerve impingement. She contended that Moore had cervical radicular pain, not radiculopathy. *See* fn. 11. She added that radicular pain and radiculopathy are "strictly speaking not exactly the same, but a lot of doctors use loosely [*sic*]." A-0077, 31:8-12. She stated that radiculopathy involved a nerve impingement "causing neurologic deficit."[12] A-0077, 30:25-31:2. She also testified that radicular pain is when the nerve is either irritated or impinged." A-0077, 30:21-24; 31:3-7. And she admitted that this involved pressure on a nerve. A-0081, 45:18-46:6. *Most importantly, Dr. Jin agreed that there was no evidence that Moore had a nerve irritation or radicular pain prior to November 14, 2016.* A-0081, 46:11-14. Thus, whichever diagnosis one assigns to Moore's injury – radicular pain or radiculopathy – Dr. Jin agreed that something happened to Moore as a result of his November 14, 2016 accident that resulted in cervical radicular pain and that was the result of pressure (nerve irritation or nerve impingement)

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[11] Dr. Jin initially testified at her deposition that Moore had evidence of radiculopathy. A-0071, 8:2-17. ("Q. There was some evidence of radiculopathy, wasn't there? A. There was. There was. Q. Okay. And if I understand radiculopathy, that's he had –over time, he had it in one or both shoulders and arms? A. Mainly in the right arm. Q. Okay. And that would normally be caused by some kind of cervical nerve impingement? A. Yes, majority of the time, yes. Q. And did you have any reason to believe that wasn't the case for him, that his radiculopathy wasn't caused by cervical nerve impingement? A. No.") However, she also testified that Moore had radicular pain caused by a nerve irritation rather than radiculopathy caused by a nerve impingement. *Compare* A-0077, 8:2-8, 8:13-17, 21:9-13; 24:21-25:3 *with* 30:17-31:7, 32:16-20. As discussed *infra*, the distinction is irrelevant to the issues in this case as Moore's injury is compensable under either diagnosis.

[12] According to Dr. Jin, the difference between the two diagnoses is that radiculopathy has both radiating pain and neurological deficit while radicular pain has radiating pain but no clear evidence of deficit. However, as Moore's medical history demonstrates, radicular pain can be disabling. Note also, Moore consistently reported "numbness" – as one of his symptoms. *See, e.g.*, A-0139; 0271; 0277; 0281.

on the cervical nerve that did not exist before the compensable accident. *See, e.g.*, A-0073, 15:17-16:2.

Second, Dr. Jin admitted that Moore's cervical radicular pain represented "new symptoms" that "resulted" from the accident and further admitted that the accident triggered those symptoms. *See e.g.*, A-0073, 15:23-16:2 ("New symptoms happened. . ." because "[h]is neck being jarred, yes"); A-0073, 14:3-6 ("the incident certainly trigger -- make his symptoms manifested, so it's, to me, is more like a trigger."); A-0079, 39:14-16 (the accident caused something new "symptomatically); A-0084, 57:25-58:7. Nonetheless, Dr. Jin opined that hitting his head on the canopy did not "cause" Moore's radicular pain because, although the accident caused a change in symptoms, it did not cause a change in pathology. *See* A-0079, 39:8-23.

2. Dr. John France

Dr. John France, a treating physician, is the Vice-Chairman of Orthopaedic Surgery, Chief of Spine Surgery and Director of the WVU Spine Center. A-0250, 1. He performed surgery on Moore's cervical spine on June 29, 2018. A-0248. Subsequently Dr. France filled out a Diagnosis Update to add C5-6 Spondylosis with C-6 radiculopathy as the compensable medical condition. Dr. France used the ICD-10-CM diagnosis code M47.22.[13] He also filed an Application to Reopen Moore's claim for four to six months of Temporary Total Disability ("TTD") benefits for the time that Moore needed to recover from the cervical fusion. A-0042.

3. Dr. Richard Vaglienti

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[13] This references the ICD-10-CM diagnostic code for "Other spondylosis with radiculopathy, cervical region" at: https://www.icd10data.com/ICD10CM/Codes/M00-M99/M45-M49/M47-/M47.22.

Dr. Vaglienti, a treating physician, is the Director of the Pain Center and of WVU Outpatient Pain Services. A-0252, 3. Dr. Vaglienti was initially involved in Moore's care and treatment when Dr. Jin referred Moore to the Pain Center. A-0081, 48:6-8. After the insurer refused to approve any further treatment by Dr. Vaglienti, Moore arranged for treatment from Dr. Vaglienti outside of the workers' compensation system. A-0075, ¶¶ 24-25. Dr. Vaglienti subsequently referred Moore to Dr. France.

Dr. Vaglienti's opinions include that "Mr. Moore had Degenerative Disease of his neck, which was asymptomatic until the accident on November 14th, 2016." A-0265, 3, ¶ 2. He also concluded that "[h]ad this injury never occurred it is possible that the Radiculopathy would never have occurred." *Id.* Dr. Vaglienti diagnosed cervical radiculopathy, ICD-10-CM code 54.12.

4. Dr. Bruce Guberman

Dr. Bruce Guberman is a Fellow of the American Academy of Disability Evaluating Physicians, a Certified Independent Medical Examiner and Member of the American College of Occupational and Environmental Medicine. A-0269, 2. Dr. Guberman personally evaluated Moore on November 6, 2018. A-0253, 1, *et seq.* He concluded that, "[a]lthough there were degenerative changes present on imaging studies of the cervical spine, which at least in part were likely present before the current injury, as far as can be determined based on records and the claimant's history, there were no prior injuries in regard to the cervical spine." A-0259-A-0260, 7-8. Dr. Guberman diagnosed C6 radiculopathy. *Id.*

5. Dr. Jonathan Luchs

Dr. Luchs reviewed the 2016 MRI at the request of the respondent and offered the opinion that Moore had a preexisting disc disease. A-0291.

III. PROCEDURAL HISTORY

Moore filed his workers' compensation claim for injuries arising out of his accident on November 14, 2016. His claim was approve for right shoulder strain/sprain, upper back straining and neck pain. A-0065. However, the accident also resulted in, at a minimum, cervical radicular pain caused, according to Dr. Jin, by pressure on a cervical nerve. A-0081, 46:2-6. Dr. Jin, however, did not request approval of compensability for cervical radicular pain or cervical radiculopathy.[14] Subsequently, Dr. France, performed a C5-C6 fusion to address the pain and numbness Moore had suffered since the accident. A-0248. Dr. France prepared and submitted a Diagnosis Update and Claim Reopening Application requesting that spondylosis with radiculopathy be added as a compensable condition and that TTD be reopened so that Moore could receive benefits for the time he could not work due to his cervical fusion. A-0241-0242. Both the request for a approval of an additional diagnosis and for reopening TTD benefits were denied by the Claim Administrator. A-0062 - 0063 . The denials were upheld by the ALJ and the Board. A-0001; A-0044.

The employer also found that Moore was not entitled to a PPD award. A-0055. Moore's protest of the award was denied by the ALJ and his denial was upheld by the Board. A-0047; A-0060. In upholding the ALJ Decision, the Board's Order failed to provide any explanation for its rejection of the petitioner's discussion of the law, other than to state that "***in the absence of further clarification***, regarding the *Gill* case, the Board finds the Administrative Law Judge's Decision is not clearly wrong." A-0045. Moore did not believe he had yet reached maximum medical improvement ("MMI") as he was still under treatment by Dr. Vaglienti who opined that Moore had

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[14] Dr, Jin most probably did not request a compensability determination regarding the cervical radicular pain that she repeatedly diagnosed in her records presumably because, as her deposition testimony demonstrated, she believed exacerbation of a preexisting disc disease was not compensable.

not reached MMI. A-0053. Whether Moore had reached MMI or is entitled to a PPD rating for his cervical radicular pain or radiculopathy is integrally tied to the final decision on the compensability determination pending before this Court.

Moore has moved to consolidate the PPD issue with the compensability and TTD issues. These matters are now all pending before this Court..

IV. SUMMERY OF ARGUMENT

A. Moore Suffered a "Discreet New Injury" as a Result of His Workplace Accident on November 14, 2016

The Board's decision is based on an erroneous conclusion of law as the ALJ and the Board adopted Dr. Jin's theory of causation as the test for compensability, a test that is inconsistent with the "discreet new injury" test set forth in of Syl. Pt. 3, *Gill v. City of Charleston.* Applying the correct legal standard, Moore's cervical radicular pain (or cervical radiculopathy) is compensable. The undisputed medical evidence, as discussed *supra*, demonstrates that Moore's degenerative disc disease was asymptomatic prior to his accident in November 2016 and was not unusual for a worker of his age and work experience. Although Dr. Jin contended that Moore did not have a new injury "pathologically," she admitted that the accident caused new symptoms and that those symptoms "resulted" from "his head being jammed." She also admitted that the accident involved sufficient force to compress Moore's spine, that it resulted in cervical radicular pain, that the cervical radicular pain was due to the irritation of a cervical nerve, that there was no evidence that Moore had that nerve irritation prior to the accident, that the accident triggered Moore's cervical radicular pain, and that Moore might not have suffered that pain for many years had the accident not occurred.

This undisputed testimony is sufficient to meet the "discreet new injury" test of Syl. Pt. 3 of *Gill*. In contrast, the ALJ and Board erred in relying on Dr. Jin's definition of new injury, *i.e.*, change in pathology, a definition that is neither mandated by nor consistent with the prior decisions of this Court. Thus, their decisions were predicated upon an erroneous conclusion of law. If the Board's decision is upheld, middle aged or older workers with asymptomatic disc disease will be deprived of workers' compensation benefits where a workplace accident results in a discreet new injury that causes a disability much earlier than would otherwise have occurred.

B. Moore's Injury of 2016 is Compensable Because it Aggravated or Accelerated the Preexisting Disk Disease, to the Extent of Causing a Disability Sooner than Would Otherwise Have Occurred

Moore's cervical radicular pain, with or without radiculopathy, is also compensable pursuant to *Charlton/Manning/Hall*. The decision in *Gill* discussed these cases, but did not overrule their syllabus points. Neither the ALJ nor the Board addressed these cases or explained why they ignored the legal standard set forth in the relevant syllabus points. Failing to apply the law as set forth in this line of cases led the Board to an erroneous conclusion of law.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate for this case under Rule 20(a)(1) and (2) because it presents this Court with an opportunity to resolve an issue left open in its earlier decisions and because it involves issues of fundamental public importance. First, this case allows the Court to define the "discreet new injury" standard set forth in Syl. Pt. 3, *Gill v. City of Charleston* as well as to clarify the continuing applicability of the *Charlton, Manning* and *Hall* line of cases. Second, the case raises the question of whether a middle aged worker who is injured at work will be able to receive workers' compensation benefits where the worker has a preexisting, but asymptomatic, disease that may not

have caused a disability for many years to come had he not suffered a work related injury. For these reasons, this case is also appropriate for a signed opinion by this Court.

Alternatively, this case may be appropriate for argument under Rule 19(1) because the law regarding the *Charlton, Manning* and *Hall* line of cases is well settled and was not disturbed by the Court's decision in *Gill v. City of Charleston*. The case is also appropriate for a memorandum opinion reversing the Board.

VI. ARGUMENT

A. Standard of Review

The decisions of the Board "resulted from erroneous conclusions of law" and are therefore subject to review pursuant to W. Va. Code § 23-5-15(c). Since the Board's errors raise questions of law, "this Court reviews the Board's resolution of the question[s] *de novo*." Syl. Pt. 1, *Reed v. Exel Logistics, Inc.*, 240 W. Va. 700, 701, 815 S.E.2d 511, 512 (2018).

B. Introduction

The ALJ and the Board applied an erroneous legal standard in holding that Moore's cervical radicular pain (or radiculopathy) that resulted from a workplace accident was not compensable because of his asymptomatic, preexisting disc disease. They ruled in this manner because (1) they applied the wrong test in determining whether Moore suffered a "discreet new injury" as required in *Gill v. City of Charleston*; and (2) they ignored the separate test articulated by this Court in *Charlton/Manning/Hall*, a test that specifically applies to cases like that of Moore, where a worker with preexisting, but asymptomatic, disc disease is injured in a workplace accident that causes a disability much sooner than would otherwise have occurred.

C. The Decisions of the ALJ and the Board, Holding that Moore's Cervical Radicular Pain Was Not Compensable, Were Based on an Erroneous Conclusion of Law as to the Legal Test for Compensability Set Forth in *Gill v. City of Charleston*

1. On November 14, 2016, Moore sustained an injury that resulted in chronic cervical and radicular pain and that should have been held compensable as an discreet new injury pursuant to Syl. Pt. 3 in *Gill v. City of Charleston*.

The fact that an injured worker has a preexisting condition does not automatically disqualify him from benefits. In *Gill*, this Court held:

> A noncompensable preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits ***merely*** because it may have been aggravated by a compensable injury. ***To the extent that the aggravation of a noncompensable preexisting injury results in a discreet new injury, that new injury may be found compensable.***

Syl. Pt. 3 (emphasis added). Moore does not contend that his previously asymptomatic cervical disc disease is compensable "merely" because it was aggravated by a compensable injury. To the contrary, the undisputed evidence establishes, as contemplated by the second sentence of Syllabus Point 3 of *Gill*, that, even if the cervical radicular pain, with or without radiculopathy, resulted from the "aggravation of a noncompensable preexisting injury," *i.e.*, cervical disc disease, the cervical radicular pain is still compensable because it is a "discreet new injury."

Meeting this test is not an insurmountable hurdle and Moore has demonstrated that he meets it. Prior to November 14, 2016, Moore had never experienced any cervical radicular pain. Then, immediately after Moore's head slammed into the canopy of the shuttle car, he developed cervical and radicular pain that has been diagnosed as radiculopathy by Drs. Vaglienti, France, and Guberman and as radicular pain by Dr. Jin although, as noted *supra*, her records lists the diagnosis code for

radiculopathy. Obviously, in any common sense analysis, Moore suffered a traumatic injury in the accident. In fact, Dr. Jin admitted that something happened to Moore's cervical spine as a result of the trauma to his neck in the accident:

> Q. . . .my point is, something happened on November 14, 2016 to change the course of his cervical pain. Something changed. Something new happened, did it not?
> A. New symptoms happened, yes.
> Q. Well, yeah, new symptoms happened because something must have happened in his neck?
> A. His neck being jarred, yes.

A-0073, 15:18-16:2. Moore's neck being jarred was not a minor matter:

> Q. Okay. And when we say 'was jarred,' he probably had some compression of the spinal cord?
> A. Correct.
> Q. Excuse me, of the spine when he hit his head on the canopy –
> A. Yes.
> Q. -- on the shuttle car; true?
> A. Yes.

Id., 16:2-11. And Dr. Jin acknowledged the jarring of Moore's neck "can result in a radiculopathy." *Id.*, 16:16-17. Although Dr. Jin did not expressly diagnose radiculopathy, she did diagnose radicular pain, the pain associated with radiculopathy, used the diagnosis code for cervical radiculopathy, and attributed it to pressure on a nerve, pressure that did not exist before November 2016 accident. *See, e.g.*, A-0081, 46:2-6 ("Q. So he had some pressure on his – one of his – the nerve that enervated the right shoulder after the accident of November true? A. Yes.), Moreover, Dr. Jin admitted that "[t]here's no evidence that he [Moore] had the nerve irritation prior to November 14, 2016. . ." A-0081, 46:11-14.

Dr. Jin not only acknowledged that Moore had developed new symptoms, she agreed that Moore's radiating pain into his right shoulder was "caused either by a nerve irritation or nerve

impingement." A-0081, 45:18-22. She also agreed that a nerve irritation means "there's some pressure on that nerve..." *Id.*, 45:23-46:1. Finally, Moore went from no symptoms of disc disease or cervical radicular pain and from no pressure on the cervical nerve to pressure causing the new and disabling pain. Under Dr. Jin's analysis, someone with preexisting asymptomatic disc disease will never qualify for benefits when a workplace accident converts an asymptomatic disc disease into disabling radicular pain because, according to Dr. Jin, a change from asymptomatic to symptomatic disease is due to the underlying disc disease and never to the trauma that precipitated the disabling symptoms. *See, e.g.*, A-0073, 13:17-18 ("accident itself is not the real pathology; it's not the cause, exact cause.").

If the facts of this case do not create a discreet new injury within the meaning of *Gill*, coal miners approaching 50 years old whose careers are cut short by injuries similar to Moore's will find themselves facing unemployment and large medical bills without the support of the workers' compensation system when, as in this case, an accident at work as significant as that or Moore, cuts their coal mining career short. Depriving workers with bona fide injuries from significant trauma cannot have been the intent of *Gill*.[15] Rather, *Gill* stands for the proposition that someone who is already suffering symptoms from disc disease should not be able to turn their preexisting pain into compensation benefits as a result of some otherwise minor incident. This is not such a case.

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[15] The Workers' Compensation Act is designed to provide workers with a no-fault system of compensation in exchange for the lost their right to pursue a lawsuit against their employer for negligence. W. Va. Code § 23-2-6. Ironically, were there no workers' compensation bar to negligence claims, Moore might have had a negligence claim where the eggshell plaintiff rule would have allowed him compensation for his injury regardless of any preexisting preexisting condition. For a general discussion, *see Reynolds v. City Hosp.*, 207 W. Va. 101, 107, 529 S.E.2d 341, 347 (2000). *See also* Menis E. Ketchum, *West Virginia Pattern Jury Instructions for Civil Cases,* § 802 Personal Injury, Wrongful Death & Property Damage (2016).

2. The Decisions of the ALJ and the Board Are Inconsistent with the Prior Decisions of this Court and Are Based on Erroneous Conclusions of Law.

An examination of other cases decided by the Court demonstrates that the *Gill* test is not as draconian as the Board or Dr. Jin seemed to think. For example, in *AT&T Mobility Servs., LLC v. Spoor*, 2015 W. Va. LEXIS 1078 (2015) (Memorandum Decision), this Court explained that it upheld the Board's finding of compensability where an employee "injured her back when she merely turned around to answer a question by a co-worker," despite the fact that the employee had a preexisting back problem. *Gill*, 236 W. Va. at 745. *Gill* commented favorably on the holding in *AT&T*.

Moore's facts – significant cervical and radicular pain after smashing his head against a shuttle car canopy where he was asymptomatic for such pain immediately before doing so – is a more compelling case for compensability than the worker who was injured in *AT&T*. Going from asymptomatic to symptomatic for cervical radicular pain does not occur unless something new happened and a new cervical nerve irritation causing new cervical and radicular pain is a discreet new injury.

Other cases decided by this Court confirm support Moore's understanding of the scope of *Gill's* "discreet new injury." *See, e.g., Cochran v. W. Va. United Health Sys.*, 2018 W. Va. LEXIS 317, *12-14 (2018) (Memorandum Decision) (finding that the employee's radiculopathy was a discreet new condition even though it was the result of the aggravation of pre-existing degenerative changes in the cervical spine); *Arch Coal, Inc. v. Lemon*, 240 W. Va. 650 (2018) (finding disc herniation compensable despite prior degenerative disease); *L.E. Myers Co. v. Behnken,* No. 18-0269, 2018 W. Va. LEXIS 560, at *13-14 (July 20, 2018) (Memorandum Decision) (holding the

claim was compensable where "[t]he evidence of record shows that [the claimant] sustained a lower back injury on June 15, 2015. Though he had prior low back problems, his symptoms greatly increased after the injury, necessitating a second back surgery and preventing him from returning to work."); *Robinson v. General Glass Co.*, No. 14–0643, 2015 W. Va. LEXIS 1079, *9-10 (2015) (Memorandum Decision) ("While there was ample evidence of previous back and hip problems, this Court has consistently held that a preexisting condition will not bar a claimant from receiving workers' compensation benefits for an injury that occurs in the course of and as a result of their employment."); *Wilson v. Rockspring Dev., Inc.*, 2013 W. Va. LEXIS 624, *4 (2013) (Memorandum Decision) (The "Office of Judges held the claim compensable for aggravation of preexisting degenerative cervical and lumbar processes" and the Court agreed.).

Arch may rely on *Rhodes v. Reynolds Mem. Hosp., Inc.*, 2017 W. Va. Lexis 1067 (2017) (Memorandum Decision). In *Rhodes*, a nurse's assistant was injured while lifting a patient. She contended that "degenerative spondylothesis and lumbar spinal stenosis should be added to the claim." *Id.*, *1. This Court upheld the denial of her request. That case, however, is distinguishable. One of the main issues in *Rhodes* was spinal stenosis. However, spinal stenosis is a "narrowing of the spaces within the spine."[16] There is no allegation in the present case that spinal stenosis is a cause of Moore's radicular pain or radiculopathy. Moreover, although the nurse assistant in *Rhodes* complained of radicular pain, she did not request an additional compensable condition based on a new discreet injury.

3. The Board erroneously adopted Dr. Jin's definition of "discrete new injury."

[16] https://www.mayoclinic.org/diseases-conditions/spinal-stenosis/symptoms-causes/syc-20352961

As noted *supra.*, Dr. Jin's opinions regarding causation were not based on the relevant legal test for preexisting injury cases. Dr. Jin relied on her own medical definition of causation although she admitted that she did not know the legal test for compensability.[17] She believed that Moore's injury was only compensable if it caused a change in pathology and the ALJ adopted Dr. Jin's test as the model for "discreet new injury."

> She [Dr. Jin] stated that while the claimant may have developed new symptoms following the compensable injury, the imaging evidence established that the compensable injury did not produce any new cervical pathology.

A-0013. This requirement of "new pathology" was evident in her deposition testimony. *See, e.g.*, A-0072, 12:20-23 ("There is a pathology and there's the events. That event cannot directly cause that pathology but can push that to become symptomatic."); A-0073, 15:15-16 ("no symptoms doesn't mean no pathology.") A-27, 27:15-20 ("Like I explained, the medical, I said the accident did play a role, but not the cause. If you want to say there's new pathology, no. I mean, but the incident/accident did play a role to make patient symptomatic."). According to Dr. Jin's test, once a worker develops cervical disc disease, any aggravation or exacerbation of that disease following a work related trauma is caused by the preexisting disc disease, not by the work related trauma, regardless of whether the worker had previously had any symptoms form the disease. Dr. Jin's opposition to Moore's claim is inconsistent with any reasonable interpretation of *Gill*.

As evident from the cases cited above, this Court has never adopted such a test for compensability. For example, in *Cochran*, the same Dr. Jin opined that the claimant's radiculopathy "was the direct result of the degenerative disease." *Id.* at *11. As a result, she rejected the

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[17] When asked what the legal test for "if it's a work injury or not," Dr. Jin said "I don't know." When asked in follow-up if she had "ever asked anybody what the test was, she responded "No. Should I?" A-0076, 25:24-26:15

compensability of the claimant's radiculopathy because "[a] cervical strain does not cause radiculopathy because it does not change the bony structure or ligament structure of the spine." *Id.* at *11. This Court rejected Dr. Jin's test as applied to radiculopathy holding, as it should in the present case, that Cochran's radiculopathy was compensable and that the Board's conclusion to the contrary was an "erroneous conclusion of law." *Id.* at *14.

Dr. Jin's analysis should be rejected for another reason. *Gill's* "discreet new injury" is an exception to the general rule that a "preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits ***merely because*** it may have been aggravated by a compensable injury." *Gill,* Syl, Pt. 3 (emphasis added). Notwithstanding the foregoing language, *Gill* recognizes that workplace accidents that result in aggravation of a preexisting disc disease can be compensable "[t]o the extent that the aggravation of a noncompensable preexisting injury results in a discreet new injury, that new injury may be found compensable." *Id.*

Yet, Dr. Jin's medical causation analysis, if adopted, will nullify the "discrete new injury" test in most, if not all, cases of preexisting disc disease because, according to Dr. Jin, no matter how minor the disc disease, nor how significant the workplace trauma, the new pressure on a nerve and the new pain it causes will always be caused by the disc disease – not by the workplace trauma. And, according to Dr. Jin, if the cause of the new pain is the preexisting disc disease, then the injury, no matter its severity, is not compensable.

Nothing in *Gill* suggests that a discreet new injury must meet Dr. Jin's interpretation of West Virginia law. To the contrary, *Gill* and its progeny support a conclusion that ALJ and the Board, in relying on Dr. Jin's analysis, based their decisions on an erroneous conclusion of law.

4. Moore's case is easily distinguishable from that of *Gill*.

Gill involved a claimant who attempted to recover benefits for a history of back pain that, on the facts, was obviously not the product of a recent workplace accident. The *Gill* claimant had a history of back injuries beginning at the age of 18 and continuing some years later when he fell 80 feet while rock climbing. He received chiropractic treatment for back problems from 2005 through early 2012 – all of which proceeded his work related injuries. 236 W. Va. at 739. Given the evidence, this Court concluded that the "pain [Gill] was experiencing was the same pain he had before the compensable injury." 236 W. Va. at 743. Here, the undisputed evidence demonstrates that Moore's pain came after his 2016 injury and that, prior to that injury, he had no cervical or radicular pain at all. Similarly, in *Coen v. Litman Excavating, Inc.*, 2017 W. Va. LEXIS 1041, at *6 (Nov. 22, 2017), this Court noted that "the diagnoses presently at issue pre-existed the compensable injury. . . ." Moore's diagnosis of cervical radicular pain was a new diagnosis following an undisputed workplace accident. In *Stephen v. Wagner*, 2014 W. Va. LEXIS 33, *6-8 (2014), the denial of a claim was upheld where the record demonstrated that the claimant had a history of multiple related medical problems, did not mention the asserted workplace injury when she later sought medical attention and there was evidence that she had not even had a work related injury at all. None of these facts are present in Moore's case.

D. Moore is Entitled to Workers' Compensation Benefits Because His Work Related Injury Aggravated And/or Accelerated the Degenerative Disc Disease, to the Extent of Causing a Disability Sooner than Would Otherwise Have Occurred

Gill discussed, in some detail, a line of cases which adopted the following syllabus point:

> A diseased workman who in the course of and resulting from his employment receives an injury, which aggravates or accelerates the

> disease, to the extent of causing a disability sooner than would otherwise have occurred, is entitled to compensation from the Workmen's Compensation Fund.

124 W. Va. 620, 22 S.E.2d 229. *Gill* also discussed *Hall*, 110 W. Va. at 551, 159 S.E. at 516, 236 S.E.2d at 241, and *Charlton*, 160 W. Va. at 667, 236 S.E.2d at 243 *Gill*, 236 W. Va at 744, 783 S.E.2d at 864. But *Gill* not overrule the syllabus point set forth above. *See also Walker v. City of Madison*, 2015 W. Va. LEXIS 26, *8 (2015) (Memorandum Decision) ("Even if Mr. Walker had pre-existing degenerative joint disease, it has been well established that a worker who, in the course of his employment, sustains an injury that aggravates or accelerates a pre-existing disease to the extent of causing a disability sooner than would otherwise have occurred, is still entitled to workers' compensation benefits.") (citing *Manning*). Relying on *Charlton*, *Manning* and *Hall*, Moore's claim is compensable because the evidence establishes all of the necessary elements.

The undisputed evidence demonstrates that Moore is a "workman who in the course of and resulting from his employment receive[d] an injury, which aggravate[d] or accelerate[d] the disease, to the extent of causing a disability sooner than would otherwise have occurred. . . ." Syl. Pt. 3, *Manning*; Syl. Pt. 1, *Hall*, Syl Pts. 1-2, *Charlton*. Dr. Jin admitted that, in her analysis, Moore had no cervical radicular pain before his injury of November 14, 2016, might not have developed cervical radicular pain for many years had he not jammed his head into the canopy, and hitting his head in the canopy triggered his cervical radicular pain.

Although the *Charlton*, *Manning* and *Hall* line of cases was argued in briefs submitted to the ALJ and to the Board, neither decision discussed these cases nor offered any explanation as to why these cases do not support compensability in Moore's case. The Decision by the ALJ and the Board

to rely on Dr. Jin's definition of compensable injury and to ignore the foregoing cases is an erroneous conclusion of law.

E. The ALJ Erred in Denying Moore's Request for a Diagnostic Update

The Board adopted by reference the ALJ's finding that Dr. France's "diagnosis of C5-6 spondylosis is not causally related to the compensable injury of November 14, 2016." A-0017. The ALJ reached his opinion, in substantial part, because "Dr. France did not request a stand-alone diagnosis of cervical radiculopathy; rather, he requested a diagnosis of spondylosis with associated radiculopathy." *Id.* From this, the ALJ concluded:

> according to the diagnosis used by Dr. France in this claim, the claimant's radiculopathy is a finding or symptom arising from the primary diagnosis of spondylosis. As fully explained above, spondylosis is not a traumatic injury diagnosis; it is a general term used to describe degenerative findings related to osteoarthritis. Accordingly, it necessarily follows that any findings, diagnoses, or symptoms arising as a result of spondylosis, such as radiculopathy, would likewise be non-compensable.

A-0018. Yet, this analysis misses the point. Moore acknowledges that, although he did not know it before the accident, he had a preexisting spondylosis, which is "degenerative disk disease," but it did not cause him any pain or numbness. Under the applicable case law, discussed *supra*, there is no reason to disqualify a diagnosis because it recognizes the obvious, *i.e*, an appropriate diagnosis for someone whose facts are an exception to the non-compensability of preexisting conditions may include spondylosis, a preexisting condition.

Moreover, Dr. France's diagnosis was C5-6 spondylosis ***with*** radiculopathy, ***not*** spondylosis standing alone. Moore's spondylosis is only the beginning of the compensability analysis. The issue is whether something happened *in addition to the preexisting spondylosis* to cause a discrete new

injury. In this case, there was such an injury: the pressure on a cervical nerve causing cervical and radicular pain, is a "discreet new injury" (*Gill*) and/or an aggravation of the preexisting disease that caused Moore to suffer a disability much sooner than would have otherwise occurred (*Charlton, Manning* and *Hall*).

The ALJ also found, and the Board affirmed, that Moore's radiculopathy is a "general term or symptom arising from the primary diagnosis of spondylosis." A-0018. He adds that it is not a "traumatic injury diagnosis." *Id.* Yet, nothing in *Gill* or any of the cases since *Gill* was decided suggests that this Court requires a "traumatic injury diagnosis" to support a claim for radicular pain or radiculopathy. Even so, Moore did have a traumatic injury, the force of which caused his pressure on a cervical nerve and his radiating pain.

In fact, the Diagnostic Update submitted by Dr. France is an appropriate diagnosis code for this injury. As an orthopedic surgeon, Dr. France used the diagnostic code that he thought most appropriate, *i.e.*, M47.22, the ICD-10-CM diagnosis code for "Other spondylosis with radiculopathy, cervical region." A-0241. Dr. Vaglienti and Dr. Jin used the same ICD-10-CM code than (M54.12), but comparison of the medical records demonstrates that all of the diagnoses related to the same combination of pain, numbness and tingling radiating from his neck down his shoulder and arm.

Most important, Dr. Jin admitted that her diagnosis of radicular pain was, in fact, no different from the radicular pain in Dr. France's diagnosis of radiculopathy.

> Q. All right. And his [Dr. France's] surgery for spondylosis with radiculopathy, he was basically treating what you [Dr. Jin] had earlier seen as cervical radicular pain?
> A. He's treating for, yeah, degenerative -- I mean, the spondylosis and C6 radiculopathy, yes.

A-0082. Because Dr. France's chosen diagnosis code recognized that Moore had spondylosis and also had compensable cervical radicular pain (or radiculopathy) does not disqualify a worker from a claim for benefits.

F. Moore's Injury Is Compensable Whether One Calls the Pain That Radiated From His Neck Down into His Right Shoulder and Arm Radicular Pain or Radiculopathy

The ALJ accepted Dr. Jin's opinion that Moore had radicular pain, but not radiculopathy, although she admitted that doctors use the terms loosely. There are two problems with the ALJ's conclusion. First, as noted above, although Dr. Jin diagnosed cervical radicular pain rather than radiculopathy, her records indicate that the diagnosis code she used for radicular pain, *i.e.*, M54.12, was the same diagnosis code that Dr. Vaglienti used for radiculopathy. Second, regardless of whether Moore's pain, numbness and tingling, as is well documented by the medical records, is labeled radiculopathy or radicular pain, it is a pain that he did not have prior to the November 14, 2016 accident and that he had consistently from the date of the accident in November 2016 until his June 2018 cervical surgery.

G. The Court Can Add a New Diagnosis to Moore's Claim Without a Written Request From a Medical Provider

Moore recognizes that Dr. France's Diagnosis Update refers to spondylosis with radiculopathy rather than to just radicular pain. However, as discussed *supra*, the record demonstrates that all of the medical professionals whose opinions are of record have described the same radiating cervical radicular pain and that there is no evidence that Moore had this radiating pain and numbness before the November 2016 accident. Under existing case law, Moore's cervical radicular pain is compensable. That compensability does not change because the ALJ and the Board

disagreed with the diagnoses code Dr. France selected as this Court can address the diagnosis code in light of the evidence.

Further, the fact that the medical providers may disagree as to the appropriate diagnosis code does not prevent this Court from finding compensability on what does not appear to be in dispute, *i.e.*, following a trauma to the head, Moore developed significant cervical radicular pain and numbness resulting from pressure on the cervical nerve that required medical treatment ranging from medication and physical therapy to a cervical fusion, and that absent the trauma, he might have lived for many years without experiencing cervical radicular pain.

Furthermore, there is evidence in the record of Moore's claim to support the addition of his radiating pain as a compensable condition, regardless of how that radiating pain is labeled. In fact, as discussed *supra*, Dr. Jin's diagnostic code (M54.12) is the same as that of Dr. Vaglienti.

On this record, this Court can and should hold that Moore's claim is compensable. Although the facts were different, this Court added a medical condition to a claim where there the claimant did not have a Diagnosis Update form submitted by a doctor. *Best Buy v. Parrish*, 2016 W. Va. LEXIS 971, 2016 WL 7105264 (Dec. 6, 2016). In *Parrish,* the claim administrator did not add complex regional pain syndrome as a compensable diagnosis, but the OOJ reviewed the records and reports and found, *inter alia*, "that six treating physicians had opined that Ms. Parrish had complex regional pain syndrome." *Id.* at *4. ***Thus, the OOJ determined there was sufficient evidence in the records to add this compensable diagnosis, even though the claimant had not formally requested the addition.*** *Id.* at *4. The Board adopted the OOJ's addition of complex regional pain syndrome as a compensable diagnosis. *Id*, at *5-*6. This Court upheld the Board's Decision because the medical evidence supported the addition. *Id.* at *6.

Similarly, in *Huntington Alloys Corp. v. Cassady*, 2017 W. Va. LEXIS 312, 2017 WL 1788940 (2017), this Court upheld the Board's Decision to add a compensable condition to a claim where the claims administrator had denied the request to add the condition to the claim where the claimant had failed to submit the request on a form filled out by his physician. In the Decision, the Court noted that § 85-20 of the West Virginia Code of State Rules "does not prohibit the submission of a request for the addition of a compensable condition by the claimant or the claimant's representative." 2017 W. Va. LEXIS 312, *8.

Although the context of the Decision is different in each of these case, they support a conclusion that this Court, on these facts, can add a diagnosis to the claim.

H. The Board Erred in Denying Moore's Request to Reopen His Claim for TTD Benefits

The ALJ's denial of the request to reopen TTD benefits is incorrect for the same reasons the ALJ is incorrect in his assessment of Dr. France's request to add radicular pain as a compensable diagnosis. The reopening of Moore's claim for TTD benefits is required here because Moore's cervical radicular pain or radiculopathy is compensable and, thus, Moore is entitled to TTD benefits and his claim for those benefits for the period following his June 29, 2018 cervical fusion surgery should be reopened to provide Moore benefits for the post operative recovery period.

I. The Board Erred in Affirming the ALJ's Order Denying Moore PPD Benefits

The ALJ Decision denying PPD benefits [A-0053-0055], affirmed by the Board [A-0060-0061], was premature because those issues could not fairly be decided before the compensability issue had been resolved. Moore contends that the finding was premature as there had not yet been a final determination of the scope of Moore's injuries. He objected to the 0% award as the issue of PPD should not be decided while the compensability issue was pending. He now seeks a decision

vacating the finding of zero percent PPD and remanding this matter to evaluate the PPD benefits to which Moore is entitled based on a diagnosis of cervical radicular pain or cervical radiculopathy.[18]

VII. CONCLUSION

For the foregoing reasons, the Decision of the Board should be vacated and reversed, Moore's request for a Diagnostic Update should be granted under the appropriate diagnostic code, Moore should be awarded TTD Benefits for the period of his recovery from his June 29, 2018 cervical fusion surgery, and the decision finding that Moore is not entitled to any PPD should be vacated and remanded for further proceedings consistent with this Court's Order.

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[18] The claimant notes the following errors in the record of the main case. The original ALJ Decision regarding the Diagnosis Update and the Claim Reopening Application included findings that Moore's counsel requested that Moore be evaluated for PPD benefits. A-0006, ¶ 17. These findings were in an entirely different and now completed claim from 2015. A-0283. Likewise, the ALJ Decision states that "the claimant was granted a 1% permanent partial disability award based upon an IME report from Dr. Hennessey." A-0007, ¶21. This is also incorrect as it reference a 1% award in the same unrelated case.

CERTIFICATE OF SERVICE

I, Allan N. Karlin, hereby certify that on January 13, 2020, service the foregoing "Petitioner's Brief" was made upon the parties listed below via U.S. Mail:

Jeffrey Brannon
Jane Pancake
Cipriani & Werner
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ALLAN N. KARLIN
WV BAR # 1953
ALLAN N. KARLIN & ASSOCIATES PLLC
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266

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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

FILED
JAN 13 2020
SUPREME COURT OF APPEALS

Complete Case Title: James Moore v. Arch Coal, Inc.

Petitioner: James Moore, Jr. Respondent: Arch Coal, Inc.

Counsel: Allan N. Karlin Counsel: Jane Ann Pancake and Jeffrey Bannon

Claim No.: 555224351 Board of Review No.: 2054350

Date of Injury/Last Exposure: 11-14-2016 Date Claim Filed:

Date and Ruling of the Office of Judges: 06-03-19

Date and Ruling of the Board of Review: 12-13-19

Issue and Relief requested on Appeal: Copmensability; repoen TTD benefits

CLAIMANT INFORMATION

Claimant's Name: James Moore, Jr.

Nature of Injury: Cervical and radicular pain or radiculopathy

Age: 51 Is the Claimant still working? ■Yes ☐No. If yes, where: Self Employed

Occupation: Truck driver No. of Years: 16 months

Was the claim found to be compensable? ☐Yes ☒No If yes, order date:

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): Old Fund or New Fund (please circle one)

Date of Last Employment:

Total amount of prior PPD awards: (add dates of orders on separate page)

Finding of the PTD Review Board:

List all compensable conditions under this claim number: See attached sheet.
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
■Yes ☐No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐Yes ■No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐Yes ■No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

APPENDIX B-REVISED RULES OF APPELLATE PROCEDURE
WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

James Moore, Jr. v. Arch Coal, Inc.
Claim No. 2017012631 Board of Review No: 2054350

List all compensable conditions under this claim number:

The claim was found compensable for neck pain, right shoulder and upper back strain, but not for radicular pain or radiculopathy.

Related Petitions:

Petitioner has filed a related petition seeking to set aside a no PPD decision and remad it for further consideration.

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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

FILED
JAN 13 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Complete Case Title: James Moore,Jr. v. Arch Coal, Inc.

Petitioner: James Moore, Jr. Respondent: Arch Coal, Inc.

Counsel: Allan N. Karlin Counsel: Jane Ann Pancake and Jeffrey Bannon

Claim No.: 2017012631 Board of Review No.: 2053723

Date of Injury/Last Exposure: 11-14-2016 Date Claim Filed:

Date and Ruling of the Office of Judges: 11-26-18

Date and Ruling of the Board of Review: 12-13-19

Issue and Relief requested on Appeal: Remand for a PPD evaluation base on the addition of a new condensable diagnosis.

CLAIMANT INFORMATION

Claimant's Name: James Moore, Jr.

Nature of Injury: Cervical and radicular pain or radiculopathy

Age: 51 Is the Claimant still working? ■Yes ☐No. If yes, where: Self Employed

Occupation: Truck Driver No. of Years: 16 months

Was the claim found to be compensable? ☐Yes ☒No If yes, order date: Not found to be condensable for radicular pain or radiculopathy

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): Old Fund or New Fund (please circle one)

Date of Last Employment:

Total amount of prior PPD awards: (add dates of orders on separate page)

Finding of the PTD Review Board:

List all compensable conditions under this claim number: See attached sheet.
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
■Yes ☐No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐Yes ■No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

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☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐Yes ■No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

APPENDIX B-REVISED RULES OF APPELLATE PROCEDURE
WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

James Moore, Jr. v. Arch Coal, Inc.
Claim No. 2017012631 Board of Review No: 2053723

List all compensable conditions under this claim number:

The claim was found compensable for neck pain, right shoulder and upper back strain, but not for radicular pain or radiculopathy.